IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.802 OF 2005
IN
SUIT NO.1211 OF 1985

I.C.Corporation. ..Plaintiffs.

V/s.

Daewoo Corporation & Anr. ..Defendants.

Mr.Anuj Narula with Ms Pratibha Mehta i/b Little & Co. for Plaintiffs.

Mr. T.K.Cooper with N. Engineer i/b Desai & Diwanji for Defendants.

CORAM: A.M.KHANWILKAR,J

DATE : SEPTEMBER 12, 2005.

P.C. :

1. Heard counsel for the parties. Perused the pleadings. By this chamber summons defendant No.1 and 2 pray for following relief.

> "(a) that this Hon'ble Court be pleased to order and direct that evidence of Mr.J.S.Lee, having his office at Hyundai Apartment, 107-207, 426 Apkujung-Dong, Seoul, Korea, be recorded on commission by appointing an Advocate and/or Officer of the Hon'ble Court of Seoul S.Korea or any other person as this Hon'ble Court may think fit as Commissioner with power to record Examination-in-chief and cross-examination through the Plaintiffs' Advocates and thereby record the evidence of the said Mr.J.S.Lee in the said proceedings;"

2. According to the defendants, in view of

developments which have taken place, it has become necessary for the defendants to approach this court for the above mentioned relief. It is stated that evidence of Mr. J.S.Lee on behalf of the defendant is necessary, as even the plaintiffs have relied on the letters issued under the signature of Mr. J.S.Lee and have relied on certain alleged representation made in the said letters. That can be explained only by the signatory of the said letters, Mr. J.S.Lee. Besides, it is stated on affidavit that the witness was in employment of the defendant No.1 till March, 1990 and even, till recently, was willing to appear as witness if such request was to be made by the defendants. But in view of the recent pre-occupation of the said witness in Korea on account of employment and also on account of service condition in present employment as well as his advanced age and declining health, he was not willing to come to India to give evidence. This communication was received by the defendants sometime in February, 2005 vide letter dated February 25, 2005 sent by the said witness addressed to the defendant corporation. It is in this backdrop, the present chamber summons has been taken out.

3. Counsel for the applicant/defendants has

relied on the decision of the Madras High court reported in **1923 Madras 321 in case of Jagannatha Sastry V/s. Sarathambal Ammal & Ors.** in support of the relief claimed in the chamber summons. Besides, reliance is also placed on the decision between the parties, of the Division Bench of our High court in Appeal No.62 of 1990 arising out of Chamber summons No.1125 of 1989, wherein the defendants had prayed for similar relief, but for examination of other two witnesses on commission as defendants' witnesses.

4. Counsel for the plaintiffs has vehemently opposed this application. He submits that the defendants have not made out any case in terms of Provisions of Order XXVI Rule 5 of the Code of Civil Procedure code in the affidavit in support of the chamber summons so as to grant relief as prayed in the chamber summons. In other words, it is contended that no foundation has been laid to support the position that evidence of Mr.J.S.Lee would be relevant and necessary to decide the points in issue. It is further argued that there is delay in taking out present chamber summons. It is contended that the suit was instituted in 1985. The defendants had taken out similar chamber summons in 1989 restricting relief to examine only two witness named in chamber

summons. No reference was made to the fact that evidence of Mr. J.S.Lee would be necessary and relevant. While the said chamber summons was pending Mr.J.S.Lee ceased to be in employment in March, 1990. At no point of time, defendants insisted before this court that Mr J.S.Lee also be examined on commission, which relief was granted in respect of the other two witnesses. On the above argument, counsel for the plaintiffs submits that the chamber summons be rejected.

5. First question that arises for my consideration is, whether the evidence of J.S.Lee would be necessary. I have no hesitation in answering that issue in favour of the defendants. This is so because, the plaintiffs themselves have relied on the communication exchanged between the parties to which Mr. J.S.Lee is signatory as General Manager-dated 1st May, 1982 (Ex.A), dated 20th September, 1982 (Ex.D), dated 23rd December, 1982 (Exh.E). There are various other communications to which Mr. J.S.Lee is signatory in his capacity as General Manager of the defendant corporation. In fact, the plaintiffs have themselves relied on abovesaid atleast three letters sent by Mr. J.S.Lee. The plaintiffs also allege that representation has

been made in the said communications sent under the signature of Mr. J.S.Lee. If it is so, Mr.J.S.Lee being signatory to those letters will have to be examined on behalf of the defendants to explain their position and therefore, is necessary witness.

6. The second question is whether the defendants should be non-suited on the ground of delay. Even this objection does not commend to me. The argument canvassed on behalf of the plaintiffs clearly overlooks that earlier chamber summons for examining two witnesses on commission was taken out by the defendants when Mr. J.S.Lee was very much in employment of the defendants. He ceased to be in employment of defendants in March, 1990. Much before that chamber summons came to be disposed of on 27th October, 1989. Indeed, the matter was carried in appeal before the Division Bench and Division Bench allowed the appeal answering the issue in favour of the defendants by order dated 22nd July, 1992. Even so, the fact that has been stated on affidavit by the defendants is that the said witness was always willing to depose as witness in the proceedings. Further, it is only recently, he has expressed his unwillingness to come to India on account of reasons stated in his letter dated 25th February, 2005.

There is nothing on record to doubt the correctness of the reasons stated by the said witness, which would prevent him from visiting India for recording of evidence. In such a situation, in my opinion, defendants have rightly relied on the exposition in the case of Jagannatha Sastry (Supra) to contend that relief prayed in chamber summons should be granted as a matter of right. Besides, it is matter of record that the Plaintiffs' evidence is still in progress. Accordingly, no prejudice will be caused to the Plaintiffs if the relief claimed in the present application is to be granted.

7. Accordingly, chamber summons is made absolute in terms of prayer clause (a), on same conditions as provided in order dated July 22, 1992 in Appeal No.62 of 1990 read with order dated 10th March, 1993 in Chamber summons No.1135 of 1992.

8. Counsel for the parties submit that they will seek further orders on production of agreed minutes before me with regard to the name of the Commissioner and persons accompanying the commission to represent both the sides.